87-1739

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

D & S AUTO PARTS, INC.,

Petitioner,

v.

SHELDON SCHWARTZ, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the doctrine of *respondeat superior* apply to an action based on RICO (Title 18 U.S.C. Sec. 1961 *et seq.*, Racketeer Influenced and Corrupt Organizations Act) against an employer corporation and its principal officer and shareholder for the acts of an employee?

PARTIES TO THE ACTION

1. *Petitioner; Appellant-Plaintiff in the District and Circuit Courts*:

   D & S Auto Parts, Inc. (D & S) is an Illinois Corporation. It is engaged in the business of selling auto parts to retail customers.

2. *Respondents; Appellees-Defendants in the Lower Courts*:

   A. *A.P. Walter Company, Inc.* (Walter) is a wholesaler or jobber of auto parts to retail vendors.

   B. *Sheldon Schwartz* is the president, and sole operating officer of Walter. He is alleged to be the sole owner of Walter.

   C. Other parties:

   Bernard Saul was a salesman who worked for Walter. He removed merchandise from Walter's warehouse supposedly to be delivered to D & S. The goods were never received by D & S. Walter billed D & S for the goods, who then paid for them. Bernard Saul was convicted of two counts of theft. A judgment was entered against him in this cause for $155,445.20 which was trebled pursuant to 18 U.S.C. §1964(c). Bernard Saul is not a party to this Petition.

   Ronald Duntz was a receiver of the property. He was also convicted of two counts of theft.

   David Much was a receiver of the property. He too was convicted of two counts of theft.

   Sibley-Halsted Auto Supply, Inc. is a corporation owned by Ronald Duntz and David Much.

   Robert Miller was alleged to be a receiver of the parts. No criminal action was initiated against him. The case with Robert Miller has been settled and he is not a party to this Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The district court issued four opinions in regard to the dismissal of the action and entry of summary judgment. They are unreported but are included in the Appendix to this Petition.

The opinion of the circuit court is also included in the Appendix to this Petition.

JURISDICTION

Judgment was entered by the circuit court on February 4, 1988. No petition for rehearing was filed.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1961(4)

'enterprise' includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

18 U.S.C. §1962 Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS §2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which it engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be

unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover in threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fees.

STATEMENT OF THE CASE

PREFACE

This case involves a fraudulent scheme in which a supplier repeatedly billed a customer for merchandise which the customer never received. The scheme continued for over five years. During that time the customer paid in excess of $150,000.00 for goods which were never delivered by the supplier.

After the scheme was uncovered, the customer sued the supplier corporation, its principal officer and shareholder, and an employee of the corporation. That action was brought in the federal court. Federal jurisdiction was predicated on a violation of RICO, Title 18, U S.C. §1961(a), (b) and (c).

The district court dismissed the supplier corporation for the reason that in a RICO action, the employer is not liable for the acts of its agents. Summary judgment was entered in favor of the principal officer and shareholder of the supplier, on the basis that he had no knowledge of the scheme. The circuit court sustained the trial court as to those two orders. It is from the circuit court's affirmance, that this petition for certiorari is being filed.

A judgment was entered by the district court against the employee for $155,445.20. That judgment was trebled pursuant to 18 U.S.C. §1964(c). In rendering the judgment the district court found that the employee had participated in the conduct of an enterprise and had violated Title 18, U.S.C. §1962(a) and (c) App. 50. No appeal was taken from that order.

After the initial pleadings were filed, three other parties and a corporation were added as defendants. These individuals and corporation were alleged to be receivers

of the merchandise. The district court dismissed these parties as to the RICO counts. They were dismissed on the basis of the bar of the statute of limitations. On appeal, the circuit court reversed the district court and held that a four year statute of limitations applies. This petition does not involve a statute of limitations question.

FACTS

The petitioner D & S Auto Parts, Inc. (D & S) operates a business of selling auto parts at retail. In about 1970 it began purchasing auto parts from A.P. Walter Company, Inc. (Walter). A.P. Walter Company, Inc., is a distributor or jobber of auto parts to retail vendors. Sheldon Schwartz is the president and sole operating officer of Walter. He is alleged to be the owner of Walter.

On or about October 6, 1977 Bernard Saul an employee and salesman for Walter, who was assigned to the D & S account, initiated a scheme to bill D & S for auto parts which it neither ordered nor received. In brief, the scheme was that Bernard Saul would go to Walter's warehouse and remove merchandise, which merchandise was ostensibly to be delivered to D & S. This merchandise was never delivered to D & S. It was kept by Bernard Saul who sold it to the other defendants Ronald Duntz, David Much and to a corporation they owned Sibley-Halsted Auto Supply, Inc., as well as to Robert Miller. (Robert Miller has been dismissed by agreement.) Walter, however, would mail an invoice to D & S, and each month would mail a statement. During the period from October 6, 1977 to January 1982 Walter initiated over 285 mailings in furtherance of the scheme.

Walter's invoices and the monthly statements included both legitimate bills for goods received by D & S as well

as the fictitious invoices. D & S paid each of the statements for over five years. The total amount paid for false invoices was $155,445.20.

In February of 1982, D & S discovered the scheme and went to Walter and the State's Attorney of Cook County. Bernard Saul, and the defendants Ronald Duntz and David Much were indicted on October 29, 1982. All three were convicted by the Circuit Court of Cook County-Criminal Division on February 18, 1983 of two counts of theft. The allegations contained in the indictment correspond with the scheme set forth above and the allegations in the second and third amended complaint which will be discussed subsequently.

On July 19, 1982 after the scheme was fully known, Sheldon Schwartz on behalf of Walter filed suit against D & S in the state court to collect invoices which D & S had not paid. The invoices in question were issued in January and February of 1982 by Walter to D & S. The ad damnum in that suit included invoices to D & S for merchandise which it never received. While the case has been dismissed it was filed by Sheldon Schwartz for Walter, after the scheme was known, and with full knowledge that some of the invoices were fictitious.

ACTION IN THE DISTRICT COURT

D & S initiated this action on August 25, 1982. Both the initial complaint and the first amended complaint were dismissed with leave to amend. The second amended complaint filed on December 1, 1983 contained two RICO counts and Count III for common law fraud. Each of those complaints named A.P. Walter Company, Sheldon Schwartz and Bernard Saul as defendants.

A third amended complaint was filed on August 9, 1984, containing four counts. Counts I and II were RICO counts. Counts III and IV were for conversion and common law fraud respectively. Ronald Duntz, David Much, Sibley-Halsted Auto Supply, Inc. and Robert Miller were added as defendants in the third amended complaint. The two RICO counts set forth the same factual allegations as to all of the defendants. The RICO counts were premised on a violation of 18 U.S.C. Sec. 1962(b) and (c) as to Count I and a violation of Sec. 1962(a), (b) and (c) as to Count II.

A.P. Walter Company was dismissed as to all counts in the second and third amended complaint pursuant to orders entered on July 6, 1984 and September 10, 1984. Summary judgment was entered on September 3, 1985, in favor of Sheldon Schwartz as to all four counts in the third amended complaint. This judgment was predicated principally (App. 16) on a finding that he lacked knowledge of the scheme. The district court also concluded that the act of suing for fictitious invoices was not determinative. On August 29, 1986, summary judgment was entered in favor of the remaining defendants, except Bernard Saul, with regard to the two RICO counts. That summary judgment was entered on the basis of the bar of the two year statute of limitations for filing RICO claims. (App. 26)

On November 21, 1986, the district court entered a Rule 54(b) order with respect to the orders entered on September 10, 1984, September 3, 1985 and August 29, 1986. That order was modified on November 28, 1986 to permit the plaintiff to dismiss Counts III and IV for conversion and common law fraud as to the defendants Ronald Duntz, David Much, Sibley-Halsted Auto Supply, Inc. and Robert Miller.

On December 8, 1986, a trial was held and at its conclusion, a judgment was entered against Bernard Saul for $155,445.20 which was trebled to $466,335.60. The judgment order was entered on December 16, 1986.

ACTION BY THE CIRCUIT COURT

D & S appealed on December 19, 1986, from the order of November 21, 1986, except as modified by the order of November 28, 1986. The circuit court reversed the trial court as to the dismissal of Ronald Duntz, David Much and Sibley-Halsted Auto Supply, Inc. by reason of the bar of the statute of limitations. The district court was upheld as to Walter on the basis that Walter could not be liable under the doctrine of *respondeat superior* and that the petitioner had not pierced the corporate veil to impose liability on Sheldon Schwartz. (App. 4)

D & S has a dual position in filing this petition:

1. That RICO, 18 U.S.C. §1962(a), (b) and (c) imposes vicarious liability on Walter for the acts of its employees.

2. That Sheldon Schwartz the sole operating officer of Walter was employed by or associated with the enterprise by reason of his conduct in directing the mailings of false invoices and statements and in filing suit against D & S for ficitious invoices.

ARGUMENT

I. BACKGROUND

William Blackstone in his Commentaries stated that an employer is liable for the acts of its agents. When one employs another to transact business "the principal must answer" for the conduct of the agent. *Commentaries of the Laws of England*, Sir William Blackstone, In Two Volumes, Vol. 2, Sec. 429, page 342, Philadelphia, J.P. Lippincott & Co. 1863. The doctrine of *respondeat superior* was and is the law in England, and has been adopted in the United States. It continues to remain the law today. Harper and James, *The Law of Torts*, Vol. 2, Sec. 26.1 and Sec. 26.2, Prosser and Keeton on Torts, 500 (5th Ed. 1984). *American Society of Mechanical Engineers, Inc. (A.S.M.E.) v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed. 2d 330 (1982). That law was not followed in this case.

Congress in 1970 enacted the Organized Crime Control Act, Title 18 U.S.C. §§ 1961-1968 (Pub. L. No. 91-452, 84 Stat. 922 (1970) Title IX The Racketeer Influenced and Corrupt Organization. In the preamble to that statute, Congress referred to the act as "remedial". "The provisions . . . shall be liberally construed to effectuate its remedial purposes". In delineating the act to be remedial it was the express policy of Congress that the common law would not be changed, nor would the statute vary the application of the common law. Had Congress intended to create or change a substantive cause of action, it would have so stated. The act would not have been termed remedial. The RICO statute was intended to "supplement not supplant" the available remedies. *Haroco v. American National Bank, Inc.*, 747 F.2d 384, 392 (7th Cir. 1985), *affd. on other grounds*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

In the instant case, the trial and the appellate courts have concluded that the doctrine of *respondeat superior* does not apply when an action is grounded in RICO. Notwithstanding the remedial nature of the statute, and the direction that it is to be liberally construed, the First Circuit in *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28 (1st Cir. 1986) and now the Seventh Circuit in the instant case, have concluded that an employer is not liable for the acts of an agent in a civil RICO case. *Schofield* and the court in this case based their conclusion on the fact that there was no congressional intent that *respondeat superior* would apply to a civil RICO claim.

Bernstein v. IDT Corp., 583 F.Supp. 1079 (Del. 1984) reached the opposite conclusion. In applying Section 1962(c), that court held that when conduct is proscribed by a federal statute, normal rules of agency law apply. There was no reference in *Bernstein* to a contrary legislative intent.

II. RICO APPLICATION

Both the district courts and the appellate courts have engrafted on RICO a series of conditions and limitations. In each instance this Court has struck down the conditions and limitations, all of which were judicially imposed. At this point another judicial limitation is presented to wit: whether the doctrine of *respondeat superior* applies to a civil RICO action.

A brief review of the cases involving RICO claims may be helpful. Title IX Racketeer Influenced and Corrupt Organizations of the Organized Crime Control Act of 1970, has had a predictable history. Commencing with *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), the Supreme Court held that RICO was not restricted to an entirely criminal enterprise.

While *Turkette* was a criminal case, it involved basic common law principles in its resolution. This Court later held in *Sedima S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) that a criminal conviction was not required in order to predicate a civil RICO claim and that a peculiar RICO injury need not be shown. Thereafter, in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. ____, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), the Court struck down the lower courts' application of more limited statute of limitation for RICO actions. The Court borrowed the four year statute of limitations from the Clayton Act. Finally, in *Shearson/American Express v. McMahon*, ____ U.S. ____, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) this Court concluded that RICO actions were arbitrable.

None of the above cases found any legislative intent which would mandate a conclusion particular to RICO or contrary to the common law. *Shearson/American Express, supra*, found no congressional mandate which would prevent arbitration. In its holding, this Court has reinforced the conclusion that RICO did not supplant available remedies. It would appear that there is no legislative intent available to construe the application of RICO other than by the application of traditional common law concepts.

III. RESPONDEAT SUPERIOR

The doctrine of *respondeat superior* has a long history in the common law. This Court in *Hydrolevel, supra*, held the employer responsible for the acts of an agent who acted with apparent authority. *Hydrolevel* involved the applicability of *respondeat superior* to the Sherman Act, 15 U.S.C. Secs. 1 and 2, which imposed treble damages. This Court in imposing liability stated that:

> ". . . under general rules of agency law principals are liable when their agents act with apparent authority and commit torts analogous to the antitrust violation presented by this case." (pp. 565 and 566)

Gleason v. Seaboard Air Line Railway Co., 278 U.S. 349, 49 S.Ct. 161, 73 L.Ed. 415 (1929) preceded *Hydrolevel, supra.* In that case the criminal act of an employee was attributable to the employer and liability was imposed. In the *Gleason* case the employee intended to benefit only himself. The court imposed liability on the employer and concluded that:

> "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." (p. 356)

Prior to *Gleason, supra,* an employer was not liable for the fraud of an agent where the employer derived no benefit. *Hydrolevel, supra,* rejected the benefit to the principal theory and stated that if the principal is liable in a civil action for antitrust violations of its agents acting with apparent authority "it is much more likely that similar antitrust violations will not occur in the future." (p. 427) The Court then concluded that the employer could take steps to stop or prevent the improper conduct. There is no reason why that rationale should not apply to a violation of RICO.

If *Hydrolevel, supra* and *Gleason, supra,* have any meaning or are to have continued vitality, then it can only be that the liability of the employer for the acts of his employees or agents must remain intact.

IV. LEGISLATIVE INTENT

The Seventh Circuit, App. 1, concluded that the legislative intent of Congress in enacting RICO was to preclude

liability of the employer for the acts of its agents. There are no citations given to support legislative intent. In *Schofield, supra,* the court also made reference to the fact that the legislative intent was to preclude the application of *respondeat superior.* While both the First and Seventh Circuits are in agreement as to the legislative intent, neither cites any reference to a legislative history in support of their conclusion.

Parnes v. Heinhold Commodities, Inc., 548 F.Supp. 20 (N.D. Ill. 1982), is often cited for the proposition that the doctrine of *respondeat superior* does not apply to a civil RICO action. *Parnes* involved the question of whether the employer brokerage house was liable in RICO for excessive trading of a customer's account by its employees. Excessive trading of a customer's account is often termed "churning". The trial court in *Parnes* held that the employer was not liable for a RICO claim.

In *Shearson/American Express, Inc. v. McMahon, supra,* this Court was faced with the same question of "churning" and RICO, but in the context of arbitration. The Court concluded that there was no congressional intent or legislative history which would preclude arbitration of RICO claims. (p. 2337) While *Parnes, supra,* was not expressly overruled, we now know that if an agreement to arbitrate exists, *Parnes* is no longer applicable. Both churning and employee dishonesty were known to the law before the enactment of RICO in 1970. The remedial purpose of RICO as set forth in the preamble mandates that an injured party have the same recourse. If the plaintiff in *Shearson/American Express* has a RICO cause of action against the employer on the basis of *respondeat superior,* what congressional intent prohibits the application of *respondeat superior* to the instant case?

The *Schofield* court on page 33 stated that a corporation should not escape liability if "their policies foster the racketeering activity. . . .". G. Robert Blakey in 58 Notre Dame Law Review 237, The RICO Civil Fraud Action in Context, Reflections on *Bennett v. Berg* 1982-1983, went back to a more basic concept. He states that the federal courts hear most major fraud litigation and that RICO provides a new theory of recovery not a basis of federal jurisdiction. From that premise he concludes that if RICO is to carry out its purpose of "helping to underwrite legally the integrity of the nation's marketplace it must be an appropriate combination swift, sure and severe". (p. 307) The basic principles of law are to be applied to RICO. These include *respondeat superior*. There is no congressional intent or legislative history to the contrary.

CONCLUSION

In the instant case, the Seventh Circuit has acknowledged that Walter received $155,455.20 from D & S and concluded that Walter presumably used the funds in its business. That court then went on to state that Walter did so "unwittingly". (App. 5) Acting unwittingly is now a defense in the Seventh Circuit which is available to an employer who is defending a RICO claim. The position was taken notwithstanding that an employer has traditionally been liable for the acts of his employees with or without knowledge, with or without consent, and where the acts of the employees are criminal.

The Seventh Circuit has effectively shut the door on the application of *respondeat superior* to a RICO claim.

It has termed Walter the victim, notwithstanding that Walter received $155,445.20 from D & S.

If Walter is a victim, then it has a cause of action against someone. Presumably it would have a cause of action against its employee Bernard Saul and perhaps the receivers of the merchandise, Ronald Duntz and David Much. There is no indication anywhere in the record, that Walter filed an action against Bernard Saul, Ronald Duntz or David Much.

Walter did file suit. It sued D & S for invoices generated in the months of January and February 1982. That suit which was filed in July of 1982 in the Circuit Court of Cook County, Illinois, claimed damages for invoices, for which D & S never received merchandise. D & S has alleged at all times that Walter's suit claimed recovery for fictitious invoices. In July of 1982 with full knowledge of what had transpired, but before the initiation of this case, Walter by its president Sheldon Schwartz, sued D & S for false invoices. It can only be concluded that the "enterprise" was functioning in July 1982, with Sheldon Schartz but perhaps without Bernard Saul.

Sheldon Schwartz was the president, sole operating officer and is alleged to be the only shareholder of Walter. He is the alter ego of the corporation. By directing the mailing of over 285 false invoices and monthly statements, collecting the funds and later suing for fictitious invoices, Sheldon Schwartz was as much associated with the enterprise as defined in 18 U.S.C. §1961(4) as was Bernard Saul.

The circuit court opinion makes no reference to Walter's suit. Furthermore, D & S went to the State's Attorney of Cook County and initiated the criminal prosecution. That action was not started by Walter as is stated by the appellate court.

It is the appellant's contention that the position of the First and Seventh Circuits cannot be justified either by legislative intent nor common law application. It can be explained only if one concludes that the lower courts have not followed the law or that the lower courts have made the law.

As the law now stands, the First and Seventh Circuits have taken a position which differs from *Bernstein, supra.* Furthermore, an action in RICO predicated on churning is available if there is an agreement to arbitrate. *Parnes, supra,* holds that the same cause of action is not available in RICO without the arbitration agreement. Clearly there is a conflict within the cases. Of more importance is the fact that a conflict exists as to the interpretation of this remedial statute. The lower courts are finding legislative intent when none exists. This should not be permitted to continue.

The Court should grant this petition.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-3140

D & S AUTO PARTS, INC.,

Plaintiff-Appellant,

v.

SHELDON SCHWARTZ, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 5279—**Susan Getzendanner,** *Judge.*

ARGUED NOVEMBER 17, 1987—DECIDED FEBRUARY 4, 1988

Before BAUER, *Chief Judge,* COFFEY, *Circuit Judge,* and PELL, *Senior Circuit Judge.*

PELL, *Senior Circuit Judge.* D & S Auto Parts (D & S), a retail auto parts dealer, purchased wholesale auto parts from defendant A. P. Walter Company, Inc. (Walter). Defendant Bernard Saul was the Walter salesperson assigned to the D & S account. Each week, Saul took inventory at the D & S warehouse and phoned in an order to Walter for needed parts. After delivery by common carrier, Walter mailed invoices to D & S, which D & S paid upon receipt.

In February 1982, D & S discovered that since July 1976, it had paid $155,445.20 for parts it never ordered or received. Saul had been taking parts from the Walter warehouse, ostensibly for delivery to D & S, and billing D & S for the parts. He actually sold and delivered the parts to defendants Sibley-Halsted Auto Parts, Ronald Duntz, David Much, and Robert Miller.

D & S's attorney promptly contacted Sheldon Schwartz, the president and principal owner of Walter. Upon hearing of the fraudulent invoices, Schwartz hired a private investigator. Following an investigation, Schwartz terminated Saul and informed the State's Attorney of Saul's activities. Saul, Much, and Duntz were indicted in October 1982. In February 1983, they were convicted of theft but acquitted of conspiracy.

D & S brought this action under 18 U.S.C. § 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act (RICO) on August 25, 1982, against Saul, Walter, and Schwartz. The complaint was stricken pursuant to Rule 11, presumably because D & S's attorney did not sign it. D & S filed its first amended complaint on August 1, 1983, which was dismissed for failure to state a claim under RICO. The second amended complaint, filed December 1, 1983, was partially dismissed. D & S moved to amend the complaint, adding additional parties. On August 9, 1984, it filed a third amended complaint, naming for the first time defendants Ronald Duntz, David Much, Sibley-Halsted Auto Parts, and Austin Auto Parts. On January 22, 1985, D & S substituted defendant Robert Miller for Austin Auto Parts.

On September 10, 1984, the court dismissed all claims against Walter. On September 3, 1985, the court entered summary judgment in favor of Sheldon Schwartz on all counts. On August 29, 1986, the court granted summary judgment in favor of all defendants added in the third amended complaint, holding that the claims were untimely under Illinois' two-year statute of limitations for injuries to business or property.

The court entered final judgment under Rule 54(b) on November 21, 1986, as to the orders of September 10, 1984, September 3, 1985, and August 29, 1986.[1] D & S appeals that final judgment.

Appellant first argues that the district court erred in dismissing the claims against defendants named in the third amended complaint.[2] Appellant contends that the court should have applied a five-year rather than a two-year statute of limitations. Neither statute applies. Since the filing of briefs in this appeal, the Supreme Court has determined that the Clayton Act's four-year statute of limitations applies to all civil RICO actions.[3] *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, 107 S.Ct. 2759, 2767 (1987). The third amended complaint, filed August 9, 1984, was timely with respect to this cause of action, which arose in February 1982. Thus the district court's dismissal of the claims must be reversed.

The second issue arises in the RICO claims against Walter and Schwartz. Appellant asserts that the district court erred in dismissing its claim against Walter and granting summary judgment in favor of Schwartz because Saul's wrongdoing renders the corporation and Schwartz vicariously liable under RICO § 1962.

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[1] On August 31, 1987, pursuant to agreement of the parties, this appeal was dismissed as to appellee Robert Miller.

[2] The district court allowed the plaintiffs leave to dismiss voluntarily without prejudice its state law claims against all defendants except Walter and Schwartz.

[3] Prior to the holding in *Agency Holding Corp.*, there was no single statute of limitations for civil RICO. Instead, courts were to select analogous state or federal statutes of limitations. *Wilson v. Garcia*, 471 U.S. 261 (1985). The *Agency* decision was based in part upon the need for a uniform rule determining the timeliness of RICO actions. *Agency*, 107 S.Ct. at 2767.

In arguing for liability, appellant does not distinguish between the employer corporation, Walter, and its president and owner, Schwartz. Appellant fails to advance any argument for "piercing the corporate veil," and instead simply conflates the issues of Walter's and Schwartz' potential liability. Absent any argument for disregarding the corporate status and imposing personal liability on its officer-shareholder, the district court correctly held that Schwartz is not personally obligated for any corporate liability. *See Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2d 565, 570-71 (7th Cir. 1985).

Appellant bases its argument for Walter's liability on the principle of *respondeat superior*. Apparently conceding that the corporation was not involved in the fraudulent scheme, appellant asserts only that Walter is vicariously liable for the acts of Saul, its agent. This court has not directly addressed the question of whether an employer may be held vicariously liable under RICO.

Two sections of RICO are relevant to this analysis. Section 1962(a) provides:

> It shall be unlawful for any person who received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

While the Seventh Circuit has not explicitly held that *respondeat superior* is not applicable to RICO, vicarious liability is inconsistent with this court's approach to direct RICO liability. *See United States v. DiCaro*, 772 F.2d 1314 (7th Cir. 1985); *Haroco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984). The statute, as interpreted by this court, imposes liability only upon a corporation that is a perpetrator of a criminal scheme. *See Masi v. Ford City Bank and Trust Co.*, 779 F.2d 397 (7th Cir. 1985); *DiCaro*, 772 F.2d at 1319; *Haroco*, 747 F.2d at 401-02.

Haroco analyzed the statute as follows.[4] The statute's definition of "person" includes "any corporation." 18 U.S.C. § 1961. Section 1962(c) applies to a "person" *associated with or employed by* a criminal enterprise. Nevertheless, only the individual, not the enterprise, is liable under subsection (c), because an enterprise cannot associate with or be employed by itself. *Haroco*, 747 F.2d at 401-02. Subsection (c) requires that the liable person and the enterprise be separate entities. *Id.* at 400. If it perpetrates illegal conduct, a corporation-enterprise can be sanctioned under § 1962(a), which, unlike subsection (c), contains no language indicating that the enterprise itself cannot be a liable "person." *Id.* at 402; *DiCaro*, 772 F.2d at 1319. This formulation of the statute is designed to impose liability upon a corporation which is a perpetrator of illegal activity but not upon an unwitting conduit of its employees' RICO violations. *Haroco*, 747 F.2d at 401. In *Haroco*, the court stated:

> [T]he enterprise may play the various roles of victim, prize, instrument or perpetrator. The RICO liability of the enterprise should depend on the role played . . . . the corporate enterprise should be liable

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[4] The court in *Haroco* followed the reasoning of *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105, (1983); and *Parnes v. Heinold Commodities, Inc.*, 548 F.Supp. 20, 23-24 (N.D.Ill. 1982).

> where it is the perpetrator, or the central figure in the criminal scheme . . . . the corporation-enterprise should not be liable when the corporation is itself the victim or target, or merely the passive instrument for the wrongdoing of others.

Id. at 401.

Haroco implicitly rejects the possibility of vicarious liability by making some participation in the criminal scheme a necessary element of liability for the corporation-enterprise. *Id.* at 401. *Respondeat superior*'s premise is liability without fault, a concept inconsistent with the language of § 1962(c) as interpreted by this court. Imposing vicarious liability would defeat the purpose of RICO, "which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it." *Id.* at 402.

Haroco's analysis is consistent with the requirements for *respondeat superior* liability. *See In re Olympia Brewing Co. Securities Litigation*, No. 77 C 1206, slip op. at 23 (N.D.Ill. December 18, 1984). An employer may be vicariously liable only for employee action taken within the scope of employment, that is, with intent to benefit the employer. *United States v. Cincotta*, 689 F.2d 238, 240-41 (1st Cir.), *cert. denied*, 459 U.S. 991 (1982). An employee violating RICO without his employer's knowledge is highly unlikely to be acting for his employer's benefit. *See Olympia Brewing*, slip op. at 24 ("When the racketeering activity constitutes a fraud on or otherwise injures the corporation sought to be held liable, it is quite likely that the elements of *respondeat superior* will not be shown"). The instant case illustrates this point. Appellant contends that Saul intended to benefit his employer, as his scheme included payments to Walter. Although Walter did receive the funds and presumably used them in its operations, it did so unwittingly. Walter was a victim, not a perpetrator. Saul stole the parts from Walter for his own profit in selling them to third parties, leaving Walter with falsified invoices, which, although paid, subjected Walter to suit as soon as D & S discovered the scheme.

Sending invoices to D & S cannot be characterized as an action intended to benefit Walter. Saul more likely intended to benefit himself by covering up his theft.

The case of the principal-victim has been troublesome for courts inclined to impose vicarious liability. For example, *Olympia Brewing* held that the normal doctrines of corporate liability apply under RICO, but noted that the *respondeat superior* requirement of benefit to the principal would likely not be met in individual cases. *Olympia Brewing*, slip op. at 24.[5]

Courts imposing vicarious liability have based their conclusions upon a principle inconsistent with this court's holdings in *Haroco* and *DiCaro*. Appellant here cites *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982) (imposing vicarious liability for antitrust violations) for the proposition that the general rules of agency law apply absent Congressional intent to the contrary. Another court has cited *Hydrolevel* in imposing vicarious RICO liability. *Bernstein v. IDT Corp.*, 582 F.Supp. 1079, 1083 (D.Del. 1984). This rule, however, is not applicable to RICO, which does indicate Congressional intent to create an exception to the general rule of *respondeat superior*. *See Haroco*, 747 F.2d at 401-02; *DiCaro*, 772 F.2d at 1319; *Parnes v. Heinold Commodities*, 548 F.Supp. 20, 23-24 (N.D.Ill. 1982). In rejecting the argument advanced by appellant, the First Circuit stated, "Indeed, there is unlikely to be a situation, in the absence of an express statement, in which Con-

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[5] In *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 33 (1st Cir. 1986), plaintiffs argued for modified *respondeat superior* liability, imposed when the corruption is at such a high level that it may be deemed corporate policy to promote or engage in illegal conduct. As the *Schofield* court pointed out, this is an argument for direct rather than vicarious liability. 793 F.2d at 33. In such a situation, the corporation itself would be subject to suit under subsection (a). *See DiCaro*, 772 F.2d at 1319-20; *Haroco*, 747 F.2d at 401. *Parnes* also suggests a distinction between low-level and high-level misconduct, approving liability (under § 1962(a)) only in the latter case. 548 F.Supp. at 24.

gress more clearly indicates that *respondeat superior* is contrary to its intent." *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 32 (1st Cir. 1986).

Other courts have interpreted § 1962 to rule out vicarious liability in civil RICO actions. The First Circuit followed the *Haroco* analysis of direct liability, concluding that vicarious liability was directly at odds with Congressional intent. *Schofield*, 793 F.2d at 32-33 ("We think it inappropriate to use *respondeat superior* to accomplish indirectly what we have concluded the statute directly denies"). The Eighth Circuit, citing *Schofield*, held that § 1962(c) was intended to foreclose vicarious liability, particularly where the principal is a victim of the agent's activities. *Luthi v. Tonka Corp.*, 815 F. 2d 1229, 1230 (8th Cir. 1987).

Because the reasoning of this court in *Haroco* indicates that vicarious liability is inappropriate in this context, we follow the First and Eighth Circuits in rejecting the doctrine of *respondeat superior* in civil RICO cases. The district court's dismissal of claims against Walter and grant of summary judgment to Schwartz are affirmed. The order dismissing claims against the defendants named in the third amended complaint is reversed and the claims remanded for further proceedings consistent with this opinion.[6]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[6] Further district court proceedings presumably will include reconsideration of pendent jurisdiction over the state law claims, which were dismissed without prejudice. *See United Mine Workers v. Gibb*, 383 U.S. 715 (1966).

[Dated September 3, 1985]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 5279

D & S AUTO PARTS, INC.,

Plaintiff,

v.

SHELDON SCHWARTZ, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO"), is before the court on several motions to dismiss and for summary judgment. Moreover, plaintiff D&S Auto Parts, Inc. ("D&S") has argued that the court should reconsider its ruling regarding *respondeat superior* liability under RICO and that it should be allowed to amend its pleadings to reallege RICO claims against a defendant that has been previously dismissed. The motions address the allegations of the third amended complaint (filed 8/9/84), as amended in an addendum (filed 1/25/85) and an order (dated 1/22/85). The motions are granted in part and denied in part.

Factual Allegations

The following are the allegations of the third amended complaint, taken as true on the motions to dismiss. Defendants are Sheldon Schwartz, Bernard Saul, A.P. Walter & Company, Inc. ("A.P. Walter"), Ronald Duntz, David Much, Sibley-Halsted Auto Supply, Inc. ("Sibley"), and Robert Miller. D&S is a corporation involved in the distribution and sale of auto parts. A.P. Walter sells new and used auto parts to distributors and wholesalers. Schwartz is the president and owner of A.P. Walter, and is wholly responsible for its day-to-day activities. Sibley, a corporation, and Miller are engaged in the business of distributing and selling new and rebuilt auto parts to wholesale and retail customers. Duntz and Much are the sole owners and principal operators of Sibley.

For fifteen years, D&S and A.P. Walter have done business with each other. Their normal practice was that A.P. Walter would send an order for parts, and shortly thereafter by mail an invoice reflecting that delivery, to D&S. Each month, A.P. Walter would mail a monthly statement reflecting the deliveries and any payments. Starting on September 1, 1977, A.P. Walter initiated a scheme to bill D&S for parts not received by it. Under this scheme, A.P. Walter employee, Saul, would remove parts from A.P. Walter premises. Saul would then send an invoice for these parts to D&S, which would pay the invoice. Meanwhile, Saul sold the removed merchandise to Duntz, Much, and Miller. According to D&S, all parties except D&S were aware of these sales. Moreover, D&S alleges that A.P. Walter knew of the false statements in the mailings. This activity continued from October 1977 to August 1982, and included the mailing of 240 false invoices and 45 false monthly statements to D&S. These fraudulent invoices reflected goods in the amount of $155,445.20. D&S contends that these mailings were each in violation of the federal mail fraud statute. 18 U.S.C. §1341.

On February 23, 1982, D&S reported this matter to the appropriate authorities, and state indictments against Saul,

Duntz, and Much were issued in October 1982. On March 2, 1982, in addition, Schwartz was present when Saul confessed about his actions in removing and selling the merchandise and in preparing the fraudulent invoices. In that confession, Duntz, Sibley, and an entity called "Just Auto Parts" were mentioned as the purchasers of the stolen goods. Saul, Duntz, and Much were all found guilty of theft in a stipulated bench trial.

D&S's RICO allegations are the following:

> 18. The defendants A.P. Walter, Sheldon Schwartz, its president and only operating officer and Bernard Saul, acting in union with each other, together with David Much, Ronald Duntz, Sibley-Halsted and Robert Miller, the receivers of the auto parts were associated in fact and combined to conduct an enterprise. . . .
>
> 19. The enterprise referred to above had a shared purposes, to wit: the acquisition, transfer and ultimate sale of new and rebuilt auto parts which were illegally converted from the plaintiff through a scheme of fraudulent billing.

(Third Amended Complaint.) The enterprise involved over 285 fraudulent mailings over five years, plus numerous sales of stolen merchandise. Defendants allegedly violated §1962(b), (c), and (d) by this conduct.

Count II concerns conduct from March 1982 to August 1982. According to D&S, Schwartz was present during Saul's March 2, 1982 confession. Despite the exposure of the scheme, A.P. Walter continued to mail fraudulent monthly statements to D&S from March to August 1982. In addition, Saul returned some auto parts and $6,000.00 to Schwartz, who kept the money and billed D&S for the parts. On July 19, 1982, A.P. Walter filed suit against D&S for payment of invoices, although, according to D&S, it never received the goods for which A.P. Walter sought payment. D&S contends that defendants violated §1962(b), (c), and (d) by this conduct, and that Schwartz additionally violated §1962(a). Counts III and IV contain common law conversion and fraud claims.

Status of Pending Motions

The parties have engaged in extensive briefing in this case. The following motions are before the court: Defendants Duntz, Much, and Sibley have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), and that motion is fully briefed. These defendants filed a supplemental motion on May 29, 1985, in which they assert an affirmative defense of the statute of limitations. In this motion, they contend that a two year period governs RICO actions. The court set a briefing schedule on this question, but responding and replying briefs have not been filed. This motion is therefore not fully briefed. It should be noted that even if the RICO statute of limitations were two years, however, claims against these defendants would not necessarily be time-barred, since relation back under Fed. R. Civ. P. 15(c) may apply. Much and Duntz, for example, were named as conspirators, although not defendants, in the second amended complaint, filed on December 1, 1983.

Robert Miller has moved to dismiss under Rule 12(b)(6) as well. He filed a separate motion asserting the limitations affirmative defense. Schwartz has moved for summary judgment, and this motion is fully briefed. Finally, D&S has requested leave to amend the complaint and has requested the court to reconsider its finding that A.P. Walter is not liable for Saul's acts under a theory of *respondeat superior*. (See D&S Memorandum, filed 1/25/85, at 6.) D&S's motion for leave to amend and add A.P. Walter as a defendant to a §1962(a) claim was stayed on May 29, 1985, pending expected RICO decisions by the United States Supreme Court.

The motions were fully briefed before the Supreme Court issued its opinions in *Sedima, S.P.R.L. v. Imrex Company, Inc.*, ____ U.S. ____, 105 S.Ct. 3273 (1985), and *American National Bank and Trust Company of Chicago v. Haroco*, ____ U.S. ____, 105 S.Ct. 3291 (1985). These cases, plus the Seventh Circuit's opinion in *Haroco*, 747 F.2d 384 (7th Cir. 1984), are dispositive of most of the arguments raised in the motions to dismiss. The court will address the remaining arguments.

Motion of Duntz, Much, and Sibley

Sibley first argues that no allegations tend to show that it had knowledge of the acts of its agents, Duntz and Much. This argument is without merit, even under the analysis of *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 24 (N.D. Ill. 1982), since Much and Duntz are high-level officers and owners of Sibley. In addition, this court has found that *Haroco* calls into doubt *Parnes*'s holding regarding *respondeat superior* liability under RICO. *See Haroco*, 747 F.2d at 40, n.18; *In re: Olympia Brewing Company Securities Litigation*, No. 77 C 1206, slip op. at 29-30 (N.D. Ill. December 18, 1984). *Haroco*'s strong dictum on this point, plus the general rule that corporations may be vicariously liable for the criminal acts of their agents, persuaded the court to reach the conclusion in that case that doctrines of *respondeat superior* could be used to hold corporations liable for the acts of their agents. Thus, the court reconsiders its July 6, 1984 opinion on that point. The ramifications of this holding on the dismissed claim against A.P. Walter will be discussed below.

These defendants argue additionally that there are no allegations tending to show that their alleged activity continued after the March 2, 1982 confession and Saul's consequent repentent actions. The only reasonable inference to be drawn is that the previously-alleged enterprise stopped at this point, and took a new form based on Schwartz's decision to use A.P. Walter to bill D&S fraudulently, without the sales to the third parties who were then under criminal investigation. The court so held in the July 6, 1984 opinion, and D&S has not attempted to allege facts tending to show that this reasonable interpretation of the second amended complaint was inaccurate. These defendants are therefore dismissed from count II.

Regarding count I, the court rejects the arguments that the association-in-fact enterprise alleged does not constitute a RICO enterprise. This court's July 6, 1984 opinion basically resolves this issue. In that opinion, the court found that the union of Saul, Much, Duntz, Just Parts,

Inc., and other third parties constituted an enterprise engaged in a course of conduct involving the disposition of the merchandise reflected on the false billings. Here, the enterprise includes at least Saul, Duntz, Much, Sibley, and Miller. If knowledge of this method of disposition of the relevant merchandise could be imputed to Schwartz and A.P. Walter, they would also be part of this informal organization to dispose of the merchandise. The question pertinent to the motion of Duntz, Much, and Sibley, is whether they can be RICO defendants based on their activities as part of this enterprise. Of course, a RICO enterprise or a part of a RICO enterprise is not necessarily a RICO person liable under §§1962 and 1964. The court did not address this issue in the July 6, 1984 opinion, since these defendants were not defendants under the second amended complaint.

Duntz, Much, and Sibley argue that they had no knowledge of the predicate acts of mail fraud, since under the allegations they at most received stolen goods, without knowing that the goods were being billed to someone else. The court rejects D&S's claim that these defendants need not have known about the mail fraud in order to be liable under RICO. The RICO person must have a relationship with an enterprise through a pattern of racketeering activity. For example, under §1962(c), the RICO person must conduct or be associated with an enterprise through such a pattern. It is not enough that a person conduct business with an enterprise which is involved in racketeering activity of which the person is unaware.

The complaint, however, sufficiently supports an inference that Duntz, Much, and therefore Sibley, knew that the mailings were a crucial part of the scheme, and that the continued success of their receipt of the merchandise was dependent upon the successful execution of mail frauds. Such an inference is supported in two ways. First, the allegations support an inference that these defendants knew the merchandise was stolen from someone. If the merchandise were not stolen from A.P. Walter, then it would be from its customers, which would likely involve

fraudulent billings. Second, the signed confession, made Exhibit A of the third amended complaint, indicates that Saul would testify that Duntz initiated the idea of the false billings.

The allegations sufficiently allege violations of §1962(c) and (d). A violation of §1962(a) is not alleged, and would be insufficient if alleged. The allegations also do not support a claim under §1962(b).

The court has reviewed defendants' arguments concerning the pendent state law claims, and denies the motion to dismiss these claims.

These defendants are therefore dismissed from count II, and dismissed from count I only as to the claim under §1962(b). Their motion to dismiss is denied in all other respects.[1]

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[1] One issue not raised by defendants is whether defendants' acts constituted a "pattern" of racketeering activity within the meaning of the RICO statute. The Supreme Court's opinion in *Sedima*, 105 S.Ct. at 3285 n.14, contains dictum tending to suggest that an actionable RICO pattern is more than simply two acts of racketeering activity. Rather, the court suggests that a certain level of continuity of and relationship between the racketeering acts is necessary before a RICO pattern is established. Another court in this district has issued an opinion on the meaning of "pattern," apparently interpreting the pattern as a series of racketeering acts that have a level of continuity and relationship and that comprise more than a single scheme or criminal episode. *Northern Trust Bank/O'Hare N.A. v. Inryco*, No. 84 C 2077, slip op. at 5-11 (N.D. Ill. 7/29/85) (Shadur, J.). *Cf. Alexander Grant and Company v. Tiffany Industries, Inc.*, No. 83-1608, slip op. at note 1 (8th Cir. Aug. 7, 1985). This court has not yet ruled on the content of the pattern requirement in light of *Sedima*, and hesitates to do so without the benefit of briefing by the parties. However, because this question, which had previously been disposed of in plaintiff's favor by clear Seventh Circuit precedent, *see, e.g., United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978), has been reopened by *Sedima*, the court denies the present motion to dismiss without prejudice to assertion of an argument that the alleged acts of racketeering do not form a RICO pattern.

Miller Motion

For the reasons stated above, Miller's motion is granted as to count II and as to the §1962(b) claim in count I. Otherwise, it is denied as to counts I, III, and IV. Miller raised the limitations defense. However, Miller's one case citation in support of this argument is insufficient on which to resolve this important issue. Moreover, Miller's burden on a motion to dismiss is to show that the complaint affirmatively precludes compliance with the statute of limitations. However, there may be relation-back or other tolling that would render this complaint timely, even under a two year period. For these reasons, the affirmative defense of the statute of limitations is not normally decided in a motion to dismiss.

Schwartz's Motion for Summary Judgment

Schwartz's motion for summary judgment is largely supported by his affidavit. In it he states that until March 1982, Saul was employed by A.P. Walter as a salesperson. (Schwartz Aff. ¶4.) On February 28, 1982, Schwartz received a telephone call from D&S's lawyer, Mason D. Sullivan, regarding a "problem" with an A.P. Walter employee. (*Id.* at ¶5.) Schwartz and Sullivan met soon thereafter, and Sullivan told Schwartz of D&S's suspicion of having been billed for merchandise that he did not receive. (*Id.* at ¶6.) According to Schwartz, "[t]his was the first time I was aware that Saul, or any person acting with him, may have engaged in any wrongdoing. . . ." (*Id.*) Sullivan, Schwartz, Schwartz's attorney, and others discussed retaining a private investigator to investigate Saul, and Schwartz thereafter "retained Wells Fargo Investigative Service to assist in the investigation of whether Saul was guilty of wrongdoing." (*Id.* at ¶¶6-7.) Schwartz frequently spoke to Sullivan regarding Saul's duties and A.P. Walter's billing and other procedures. (*Id.* at ¶8.)

The investigation culminated in Saul's written confession, dated March 2, 1982. In the confession, Saul states that at the instruction of Duntz, he would make up an

order for D&S on Friday, "with the story that I would deliver same on Mondays." (*Id.* at Exhibit A.) Saul would then sell the parts to third parties at "considerably lower prices." Saul admits that he knew D&S would be billed for the parts. (*Id.*)

Schwartz states that upon receipt of the confession, he terminated Saul and "promptly informed the Cook County States Attorney of the results," assisting the office's investigation. (*Id.* at ¶10.) Saul, Duntz, and Much were later indicted, although A.P. Walter and Schwartz were not implicated in any manner by the criminal proceedings. (*Id.* at ¶12 and Exhibit B.) These defendants were found guilty in a stipulated bench trial. A review of the transcript reveals that Schwartz and A.P. Walter were not mentioned as involved in the scheme. (*Id.* at Exhibit C.)

Schwartz then states that he does not know and would not recognize David Much, that Much was never an A.P. Walter employee, and that, apart from a phone call between Schwartz and Much in 1985, he does not ever recall their speaking to each other. (*Id.* at ¶17.) Schwartz believes he may have met Duntz at a trade show in the presence of other persons. He further testifies that he may have spoken to Duntz over the telephone when Duntz was placing an order or calling about credits. Schwartz is certain that at any such meeting, however, the conversations had nothing to do with the matters concerned in this lawsuit. (*Id.* at ¶18.) Schwartz's testimony about Miller is the same. (*Id.* at ¶19.) As for Saul, Schwartz knew him only as an A.P. Walter employee. (*Id.* at ¶16.) He did not initiate or participate in any scheme to defraud D&S, and did not know of or suspect what Saul was up to. (*Id.* at ¶¶13-15.)

Regarding the allegations of count II, which concern conduct after Saul's confession, Schwartz states that he did not knowingly mail false invoices to D&S, if indeed any were false. (*Id.* at ¶20.) Schwartz further states that since the date of Saul's confession, D&S has made only one payment to A.P. Walter, in the amount of $1,774.78,

for merchandise that Sullivan told Schwartz D&S had in fact received. (*Id.* at ¶20 and Exhibit D.) Moreover, Schwartz states that neither he nor A.P. Walter received a $6,000.00 check or any other money from Saul. (*Id.* at ¶21.) Schwartz further states that neither he nor A.P. Walter ever billed D&S for parts removed by Saul and returned to A.P. Walter or the State's Attorney. (*Id.* at ¶22.) Regarding D&S's allegations that Schwartz filed a lawsuit for payments for merchandise never received by D&S, Schwartz states that to the best of his knowledge, the merchandise was received by D&S and that that was his state of mind at the time he filed the lawsuit. Schwartz's intention at the time he filed the state court lawsuit was to recover only for merchandise received by D&S.

At the end of his long affidavit, Schwartz testifies that:

> I have never received any income, money, property, or anything else of value from the alleged "enterprise" or "association-in-fact" consisting of Saul, Much, Duntz, A.P. Walter, Robert Miller, or any combination of those parties.
>
> I presently do not, nor have I ever to the best of my knowledge, possessed any property which belongs to D&S and I have never been requested by D&S to return any of its property.
>
> I have never conspired with the codefendants to do anything, or agreed with any of them to carry out any course of conduct.

(*Id.* at ¶¶24-26.)

In response to the motion for summary judgment, D&S responds that Schwartz should be liable for the payments on the false invoices because he is an officer of A.P. Walter. In addition, he points to Saul's confession, which indicates that Saul "intend[ed] to start payment with a personal check in the amount of $6,000.00 and then with a continuous monthly payment," as evidence that Schwartz received $6,000.00 from Saul. Responding to the testimony that Schwartz's suit was brought in good faith, D&S simply

states that of the $13,688.13 that A.P. Walter claims is due, D&S "believes" that $5,557.91 is not due. Isadore Szudy, the president of D&S, has signed the document containing these representations and swears they are true. There is no claim under Rule 56(f) that D&S requires more time in which to prepare a response to the motion for summary judgment.

First, it should be noted that because D&S did not file a statement setting forth the disputed issue of material fact, as required under Local Rule 12(f), the material facts set forth in Schwartz's properly filed Local Rule 12(e) statement are taken as admitted. This supports granting Schwartz's motion for summary judgment unless D&S is correct that Schwartz may be held liable vicariously for Saul's misconduct.

However, even without taking into consideration D&S's admission under Local Rule 12(f), Schwartz's motion for summary judgment must be granted. There is simply no evidence of Schwartz's personal knowledge of any of Saul's wrongdoing, nor is there evidence of his participation in Saul's activity beyond the unsupported allegations that he knew of the sales to third parties and that he "either mailed all of the invoices and monthly statements or they were mailed under his immediate direction and control." (Third Amended Complaint ¶¶11, 15.)

Schwartz's affidavit contains firm denials of his participation in the alleged fraud. In addition to these denials, however, the affidavit contains references to supporting extrinsic facts that could be challenged by D&S but are not. For example, Schwartz refers to conversations between himself and D&S's lawyer in this case. D&S does not deny that Schwartz cooperated in the investigation, terminated Saul upon learning of his activity, and notified the authorities immediately after the investigation was concluded. There is no evidence tending to show that Schwartz knew the other members of the scheme in any manner except through slight work-related contacts. Saul, Duntz, and Much have pled guilty to the scheme and did not at trial

indicate that Schwarz had any knowledge of or criminal responsibility for their acts.

Regarding Schwartz's alleged misconduct after the March 2, 1982 confession by Saul, Schwartz's testimony that D&S did not pay for any merchandise not received is uncontroverted. Hence, the alleged injury in count II would be the costs of defending the phony lawsuit and Schwartz's failure to turn over certain parts and the $6,000.00 check to D&S.

Schwartz flatly denies receiving such a check and auto parts from Saul. D&S's only evidence on these issues is the statement in Saul's confession that he intended to make out a personal check for $6,000 to Schwartz, but there is simply no evidence that Saul in fact did this.

Regarding the continued mailing of false invoices after the scheme was revealed, Schwartz denies this allegation. D&S has presented no evidence tending to show that this occurred, although it agrees with Schwartz that such behavior by Schwartz would be "inconceivable." Thus, there is simply no evidence of the post-March 2, 1982 mailing of fraudulent invoices or the use of those invoices as evidence of amounts due in A.P. Walter's lawsuit.

The final count II allegation concerns the phony lawsuit for collection of money due on false invoices. D&S president Szudy states that of the $13,688.13 demanded in the suit, he "believes" that $5,557.91, which is the total of the amounts reflected on eight invoices (all dating from January 1982), is in fact not due. (By this argument, D&S appears to be admitting that the suit is largely meritorious.) Since the invoices date from January 1982, they may have been executed by Saul, or they may be legitimate invoices reflecting actual orders by D&S. D&S presents no evidence on this issue, nor does it present evidence tending to show that Schwartz should have known that the invoices were false. Against Schwartz's denial of fraudulent intent in filing the lawsuit and the fact that he had no involvement in Saul's scheme, D&S offers only its unsupported belief that the invoices were false and that Schwartz knew of it when suit was filed.

While issues of motive and intent are not normally decided on motions for summary judgment, the scant evidence adduced against the motion judged against the evidence presented in favor of it persuades the court to credit Schwartz's statements concerning his intent. D&S cannot stand solely on an argument that Schwartz's statements are self-serving where the evidence does not support a reasonable inference that Schwartz knew of and participated in the alleged frauds.

The court therefore finds that Schwartz did not himself commit violations of RICO and the mail fraud statutes. D&S's final argument is that Saul's actions are imputed to Schwartz vicariously, and thus through Saul, Schwartz is personally liable for the fraud. For purposes of the RICO claim, the federal common law of officer liability probably applies, although Illinois and federal law appear to be the same on this point. It is general principle of corporation law that officers and directors are not liable for the corporation's acts in which they did not participate or which they did not authorize or direct. *Murphy Tugboat Co. v. Shipowners & Merchant's Towboat Co.*, 467 F.Supp. 841 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (personal liability of officer or director must be founded on specific acts of individual); *Mangual v. General Battery Corp.*, 710 F.2d 15, 19 (1st Cir. 1983) (same). D&S has not presented evidence tending to refute Schwartz's affidavit that he had no individual involvement in the RICO activity. Moreover, D&S has not even alleged that Schwartz is the alter ego of A.P. Walter, such that he should be liable for conduct for which A.P. Walter is liable. *See Van Dorn Co. v. Future Chemical and Oil Corp.*, 753 F.2d 565, 570-71 (7th Cir. 1985) (elements necessary to pierce corporate veil; Illinois law). Hence, this alternative theory of Schwartz's personal liability is without merit. The motion for summary judgment as to counts I and II is therefore granted.

It is clear from the foregoing that Schwartz cannot be liable for common law fraud, and summary judgment on count IV is granted. Furthermore, no claim for conver-

sion against Schwartz personally is supported by the evidence, since he was not involved in the alleged wrongful conduct. Schwartz's motion for summary judgment is therefore granted as to all counts.

D&S Motions

D&S has requested the court to reconsider its holding regarding *respondeat superior* liability under RICO. The court may reconsider this decision, since the dismissal of A.P. Walter was not a judgment. Fed. R. Civ. P. 54(b). As noted above, the Seventh Circuit's analysis in *Haroco*, decided after the court's July 6, 1984 opinion, persuaded this court to decide that there can be such vicarious liability under RICO, and thus that it would not follow *Parnes* on this point.

The question before the court is whether Saul was acting within the scope of his employment when he removed the merchandise and executed the false billings such that A.P. Walter may be liable vicariously for what Saul did. (There continue to be no allegations tending to suggest that the corporation is liable for the alleged fraud on any but a *respondeat superior* theory.) The allegations certainly support the inference that the execution of invoices was within the scope of Saul's duties; he had apparent authority to complete the invoices. And, while *respondeat superior* is not found where the agent is intending to hurt the corporation, here it is reasonable to infer that Saul did not want to hurt A.P. Walter; rather, he wanted A.P. Walter to be paid and he intended to hurt D&S. At least, Saul abused his position at A.P. Walter, and used the authority of A.P. Walter to injure D&S. Under these circumstances, it is possible that A.P. Walter may be vicariously liable for Saul's conduct, both under RICO and state common law. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*, 456 U.S. 556, 570-576 (1976). However, A.P. Walter should have an opportunity to respond to the issue of whether Saul's acts were in the scope of his employment such that *respondeat*

superior liability applies. A.P. Walter shall file a short memorandum on this point by October 4, 1985, D&S to reply by November 1, 1985.

D&S also has requested leave to amend count II of the complaint, alleging A.P. Walter as the RICO enterprise and stating a claim under §1962(a). The court stayed this motion pending the Supreme Court's rulings. Since *Haroco*'s discussion of §1962(a) was not disturbed by the Supreme Court, a RICO enterprise under this subsection may also be a RICO person. In addition, dictum in *McCullough v. Sutter*, 757 F.2d 142 (7th Cir. 1985), suggests that even a one-person corporation may be the enterprise with which its sole shareholder and officer associates under §1962(c).

Because of the ruling above regarding Schwartz's lack of individual responsibility for racketeering activity after Saul's confession, however, Schwartz could not have invested in A.P. Walter through a pattern of racketeering activity, since Schwartz was not engaged in such activity. Moreover, no allegations show that anyone else invested in or was associated with A.P. Walter through racketeering activity after the confession. Indeed, the evidence regarding Schwartz and the allegations regarding the other defendants establish that there was no racketeering activity after the March 2 confession. Hence, the motion to amend count II would be futile, and leave to amend is denied.

Conclusion

Schwartz's motion for summary judgment is granted. The motions of Duntz, Much, Sibley, and Miller are denied, except as to the claims under §1962(c) and count II. The motions to dismiss under the statute of limitations or because of deficient "pattern" allegations are denied without prejudice. D&S's motion to amend is denied. D&S's motion to reconsider, which would bring A.P. Walter back as a defendant, is taken under advisement pending A.P. Walter's response due October 4, 1985, and D&S's reply

due November 1, 1985. There being no defendants to count II, count II is dismissed in its entirety.

It is so ordered.

/s/ SUSAN GETZENDANNER
Susan Getzendanner
United States District Judge

September 3, 1985

[Dated August 29, 1986]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 5279

D & S AUTO PARTS, INC., an Illinois corporation,

Plaintiff,

v.

SHELDON SCHWARTZ, BERNARD SAUL, A. P. WALTER COMPANY, INC., an Illinois corporation, RONALD DUNTZ, DAVID MUCH, SIBLEY-HALSTED AUTO SUPPLY, INC., an Illinois corporation, and ROBERT MILLER,

Defendants.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964 ("RICO") is before the Court on the motion of defendants Ronald Duntz, David Much, Sibley-Halsted Auto Supply, and Robert Miller for summary judgment on statute of limitations grounds, and the motion of plaintiff D&S Auto Parts, Inc. to amend its complaint and add A.P. Walter Co., Inc. as a defendant. For the reasons set forth herein, the defendants' motion for summary judgment is granted and the motion to amend is denied.

Motion For Summary Judgment

The motion for summary judgment is based on the fact that the defendants Duntz, Much, Sibley-Halsted, and Miller were all added as defendants more than two years after D&S knew of its injuries and their involvement. D&S has argued for tolling on the grounds that this court stayed granting leave to file an amended complaint pending decision on various motions to dismiss. The docket sheet, however, shows that no motion to add new defendants was made until July 19, 1984, more than two years after the limitations period had run. D&S also argues that the new claims should relate back under Fed.R.Civ.P. 15(c) since the added defendants knew or should have known of the pendency of this proceeding. Plaintiff ignores the requirement of Rule 15(c), however, that the defendant also know that "but for a mistake concerning the identity of the proper party, the action would have been brought against him." There is no such mistake of identity here; plaintiff simply waited more than two years to add the new defendants.

Because neither tolling nor relation back is appropriate, the sole remaining issue is whether two years represents the appropriate limitations period for RICO actions in Illinois. Defendants rely on *Electronic Relays (India) Pvt. Ltd. v. Pascente*, 610 F.Supp. 638 (N.D. Ill. 1985), in which Judge William Hart of this district applied to RICO the two-year limitations period for statutory penalties of Ill. Rev.Stat., ch. 110, §13-202. Judge Hart's opinion was based on the observation that Illinois courts have construed treble damage actions as penal rather than remedial, and that under *Wilson v. Garcia*, 105 S.Ct. 1938 (1985), the court should apply a single limitations period to all RICO actions regardless of the character of the predicate acts. Judge Hart's position has been followed by a majority of judges in this district. *See, e.g., Fink v. Meserve, Mumper & Hughes*, No. 84 C 10382 (June 19, 1986) (Marshall, J.); *Newman v. Wanland*, No. 85 C 2265 (N.D. Ill. March 6, 1986) (Williams, J.); *Ambrosino v. Rodman & Renshaw, Inc.*, No. 84 C 4586 (N.D. Ill. Jan. 23, 1986) (Plunkett, J.);

City of Chicago v. North Austin Investment Corp., No. 85 C 0441 (N.D. Ill. Dec. 22, 1985) (Rovner, J.); *Baselki v. Paine Webber*, No. 80 C 3157 (N.D. Ill. Nov. 22, 1985) (Parsons, J.); *Bolingbrook Properties II v. Irvin*, No. 84 C 10480 (N.D. Ill. Aug. 5, 1985) (Moran, J.); *Long Grove Country Club Estates v. Village of Long Grove*, No. 82 C 6868 (N.D. Ill. Oct. 4, 1985) (Holderman, J.); *Caldarone v. Brown*, No. 80 C 6251 (N.D. Ill. Sept. 30, 1983) (Kocoras, J.). The position is not without dissenters, however. *See Griggs v. Robinson Securities*, No. 84 C 4679 (N.D. Ill. May 9, 1986) (Grady, J.); *Davis v. Smith*, 635 F.Supp. 459 (N.D. Ill. 1985) (Nordberg, J.); *BA Mortgage & International Realty Corp. v. Taylor*, No. 84 C 7739 (N.D. Ill. June 7, 1985) (Norgle, J.). These three judges hold that a five year statute of limitations is appropriate for RICO, although on different rationales.

In this case, plaintiff argues that the five-year statute of limitation contained in Ill.Rev.Stat., ch. 110, §13-205, for fraud actions should apply to all matters set forth in its complaint. The sole authority cited for this position is *Willcutts v. Jefferson Trust & Savings Bank of Peoria*, No. 74 C 329 (C.D. Ill. April 21, 1982). In that case, however, the court was confronted with the choice of the three-year limitations period for Illinois Securities Law violations or the five-year period for fraud actions: the opinion in no way discusses the statutory penalty argument raised by defendants and does not analyze the issue in light of *Wilson v. Garcia*. Indeed, most courts following *Wilson* have concluded, appropriately in my view, that the limitations period should be based on the RICO remedy as a whole and not the predicate acts. *Willcutts*, by looking to the predicate acts, violates this precept. Despite the availability of other opinions on the subject at the time plaintiff filed its brief, plaintiff cited none of those cases. The court therefore considers arguments based on those more recent cases to be waived.

The court also considers this issue to be one in which uniformity is more important than reaching an optimal rule, and therefore adopts the two-year statute of limita-

tions for statutory penalties followed by most members of this court. *Wilson v. Garcia* teaches that where Congress has not legislated on the time period within which a federal claim can be asserted, the federal courts must borrow the "most appropriate" state statute of limitations absent some inconsistency with federal law, and that uniformity is important in this calculation. Plaintiff does not point to any flaws in Judge Hart's reasoning or citation of authorities, but merely suggests that the five-year period for fraud actions is somehow "more appropriate." Such a vague suggestion is insufficient argument for disregarding the clear weight of authority among judges of this district.

Although plaintiff's response has waived the argument, the court has briefly considered the disarray in the case law. Judge Hart in *Electronics Relays* relied on an early Illinois case which held that an action for treble damages is penal in nature and therefore subject to such limitations period. *Chicago, B&O Railroad Co. v. Jones*, 149 Ill. 361, 37 N.E. 147, 158 (1894). The reasoning of that case was recently relied on by the Illinois Appellate Court to find that a state's filing of a treble damage antitrust action is "penal" within the meaning of a statutory provision governing election of remedies. *People v. Climatemp, Inc.*, 101 Ill.App.3d 1077, 428 N.E.2d 1096 (1st Dist. 1981). Statutes which allow recovery of actual and punitive damages, however, are not penal for purposes of applying the two-year limitations period. *See Henon v. Lever Bros. Co.*, 114 Ill.App.3d 608, 449 N.E.2d 196, 197 (1st Dist. 1983); *McDonald's Corp. v. Levine*, 108 Ill.App.3d 732, 439 N.E.2d 476, 480 (2d Dist. 1981). Although the *McDonald's* opinion contains some language which would raise questions about Judge Hart's result, that language is nowhere found in the cases cited to support it, and the Court chiefly relied on the fact that punitive damages cannot make a statute penal when such damages have always been recoverable at common law. This latter reasoning does not extend to the statutory treble damage remedy.

As noted in *M.H. Vestal Co. v. Robertson*, 277 Ill. 425, 115 N.E. 629, 631 (1894), a statute is penal when it amplifies common-law or previous statutory causes of action for deterrent purposes. Even if the statute provides compensatory remedies, the two-year limitations period applies since the plaintiffs will typically have a longer period in which to recover their damages at common law. Similarly, civil RICO does not create new rights, but redefines certain criminal activity for purposes of limiting the expansion of organized crime. Under Illinois law, the expanded civil remedy would be considered penal, and plaintiffs who did not bring such actions within two years would be relegated to previously existing common-law remedies or statutory causes of action.

The chief cases diverging from Judge Hart's view do not look carefully to Illinois precedent, which under *Wilson v. Garcia* is of primary importance. Accordingly, the court concludes that *Electronic Relays* is sound and should be followed. Because plaintiff added defendants Much, Miller, Duntz, and Sibley-Halsted as defendants more than two years after knowing of their involvement in its injuries, the motion for summary judgment will be granted.

Motion To Amend

In this motion, D&S seeks to amend its complaint to add A.P. Walter Co. as a defendant. In order to understand this motion, some procedural background is necessary. As originally pleaded, D&S's complaint charged that defendants Sheldon Schwartz, Bernard Saul, and third parties including Ronald Duntz, David Much, and Just Parts, Inc., together engaged in a scheme whereby D&S was defrauded into paying bills on mailed invoices for goods never shipped or received. The goods were in fact taken by Saul from A.P. Walter's premises and sold to third parties; the invoices were issued both to defraud D&S and to cover up the scheme.

On October 13, 1983, I dismissed A.P. Walter as a defendant to the RICO claims on the grounds that A.P.

Walter could not be both enterprise and defendant. Plaintiffs filed a second amended complaint to allege an enterprise comprising an association in fact of the various above defendants. On July 6, 1984, and September 10, 1984, respectively, I found that the allegations showed no participation by A.P. Walter or its president Schwartz, and dismissed the court alleging such an enterprise against them. A.P. Walter was dismissed as to all counts. Schwartz remained a defendant as to Count Two of the complaint, but was later granted summary judgment in an opinion and order dated September 3, 1985. In that opinion, I also reconsidered the July 6, 1984 opinion insofar as it suggested that A.P. Walter Co. could not be liable under RICO on a *respondeat superior* theory for Saul's actions. Because it was not clear whether the necessary elements of a vicarious liability claim were pleaded, however, the court requested an additional memorandum from A.P. Walter before ordering reinstatement. Due to settlement discussions and problems in the case, the requested brief was not filed until May 9, 1986.

In its brief, A.P. Walter Co. notes that the scheme alleged by plaintiff involves the theft of auto parts from A.P. Walter by one of its salesmen, Bernard Saul, followed by the preparation and mailing of fraudulent invoices, the chief purpose of which was to avoid their detection from higher-ups at A.P. Walter. Thus, under the most reasonable interpretation of the complaint, A.P. Walter was a passive instrumentality of the alleged scheme insofar as D&S was concerned, and was a victim of the criminal enterprise generally. While A.P. Walter collected payments from D&S for parts which D&S never received, those payments were not a windfall to A.P. Walter, since the parts themselves had been stolen by Saul and sold off for private profit.

In *Haroco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 401 n.18 (7th Cir. 1984), *aff'd*, 105 S.Ct. 3219 (1985), the Seventh Circuit intimated that a corporation's responsibility for the acts of its agents could be proper under RICO. The Court also stressed, however,

that "the corporation-enterprise should not be liable when the corporation is itself the victim or target, or merely the passive instrument for the wrongdoing of others." *Id.* at 401. The Court expressed the view that the typical situation where corporate enterprises would be subject to RICO liability under §1962(c) would be when the enterprise itself is the perpetrator or central figure in the criminal scheme through the acts of high-level agents.

In *In Re Olympia Brewing Co. Securities Litigation*, slip op. No. 77 C 1206 (N.D. Ill. Dec. 18, 1984), I accepted the view that general rules of corporate criminal liability should apply to RICO, and that this would mean imposing RICO liability on a corporation where its agents violate RICO within the scope of their employment and are motivated at least in part by an intent to benefit the corporation. *Olympia Brewing* involved an alleged market manipulation scheme which, although done without the approval of higher-ups, generated significant commissions for the defendant employer and involved no immediate harm to the employer. On these facts, the court allowed the pleadings based on vicarious liability to go forward.

This case is factually distinguishable from *Olympia Brewing* in that Saul's obvious motive was not to benefit A.P. Walter Co. in any way but to cover up his own unlawful thefts from the company. The only way A.P. Walter can be considered a non-victim of the scheme is by dissecting the racketeering activity into two separate schemes: one involving the thefts and the other involving the fraudulent mailing of invoices. Only as to the latter scheme could A.P. Walter properly be considered a RICO defendant. While I earlier considered the issue in this fashion, upon closer reflection such dissection seems implausible: the criminal activity was clearly related, and the evidence on Schwartz's motion shows that upon discovery of the conduct A.P. Walter cooperated with D&S in stopping the activity and punishing Saul. Thus, even under normal principles of corporate vicarious liability, A.P. Walter could not be held accountable for Saul's acts, notwithstanding Saul's use of apparent authority in sending out false in-

voices. Such liability is doubly inappropriate in view of *Haroco*'s language on the limits of *respondeat superior* liability under RICO. Accordingly, the motion to amend to add A.P. Walter is denied as futile.

Conclusion

The motion of defendants Duntz, Much, Miller, and Sibley-Halsted for summary judgment is granted. The motion of plaintiff to add A.P. Walter Co. as a defendant is denied. The sole remaining defendant is Bernard Saul, who recently represented to the court that he has discharged his lawyers for lack of funds and apparently does not intend to contest the case. Plaintiff should confer with Mr. Saul and inform the court at the September 15, 1986 status hearing whether it intends to seek a default against Saul or to dismiss him from the action, at which time the Court will enter a final judgment as to all parties.

It is so ordered.

/s/ SUSAN GETZENDANNER
Susan Getzendanner
United States District Judge

August 29, 1986

[Dated July 6, 1984]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 5279

D & S AUTO PARTS, INC.,

Plaintiff,

v.

SHELDON SCHWARTZ, BERNARD SAUL
and A. P. WALTER COMPANY, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, et seq. ("RICO"), is brought by plaintiff D & S Auto Parts, Inc. ("D&S") against defendants Sheldon Schwartz, Bernard Saul, and A.P. Walter Company, Inc. ("A.P. Walter"). A.P. Walter and its alleged president Schwartz now bring this motion to dismiss D&S's second amended complaint.

The court struck the original complaint on June 27, 1983 for failure to comply with Rule 11. The first amended complaint was dismissed on October 13, 1983 for failure to state a claim under RICO. While the second amended complaint contains many of the same factual allegations as the first amended complaint, some changes, especially the change in the definition of the so-called "enterprise,"

merit the court's attention. The facts as alleged in the latest complaint will be taken as true on this motion to dismiss.

Count I

Count I alleges that defendants and others committed several acts of mail fraud from October 1977 through August 1982 in violation of 18 U.S.C. §1341. (Second Amended Complaint ¶11.) During this time, defendants mailed over 45 "false and misleading monthly statements" and over 285 "false and misleading invoices" to D&S. (*Id.* at ¶¶8, 11.) During the bulk of this period, from October 1977 through January 1982, D&S was unaware that the goods reflected in these invoices and statements had neither been shipped to nor received by it. D&S therefore paid bills of $155,455.04 for goods never received. (*Id.* at ¶9.)

The mail fraud alleged involves a scheme to defraud D&S into paying bills on invoices for goods never shipped or received. The use of the mails occurred in the mailing of tens of invoices and statements that resulted in the payment by D&S of the amounts set forth in the invoices. The mail fraud statute requires specific intent to defraud, *U.S. v. Martin-Trigona*, 684 F.2d 485, 492-493 (7th Cir. 1982), and such is alleged against Saul. (*Id.* at ¶¶6, 7, 13, 15.) However, the factual allegations of Count I do not support the general allegations of specific intent to defraud on the part of Schwartz and A.P. Walter.

With respect to Schwartz, D&S admits in its responding memorandum that its allegations of specific intent in Count I stem primarily from Schwartz's position as president of A.P. Walter:

> In Count I the plaintiff has alleged that Sheldon Schwartz was the sole operating officer of A.P. Walter Company, Inc. for all practical purposes Sheldon Schwartz was A.P. Walter Company, Inc. The corporate defendant is a small, closely held company. It operated through Sheldon Schwartz only, and not through a myriad of officers and directors.

(Response to Motion to Dismiss p. 4.) Specifically, the allegations relating to Schwartz's intent in the second amended complaint include the following: Schwartz is the principal owner and operator of A.P. Walter (¶4), Saul acted in his capacity as employee and agent of A.P. Walter (¶6(A)), the merchandise removed from A.P. Walter's premises was done with Schwartz's knowledge and assistance (¶6(C)), the removal of merchandise by A.P. Walter's employees and officers was contrary to the custom of A.P. Walter (¶6(D)), Schwartz mailed or caused to be mailed the false invoices and monthly statements (¶11), and Schwartz acted as a member of the RICO enterprise to dispose of stolen goods (¶¶14-15). In other parts of the complaint, knowledge by A.P. Walter that the invoices and statements were false and that the goods were never shipped to D&S is alleged. (¶¶8, 6(D).)

However, no allegation is made that Schwartz knew that the invoices and statements were false and that the goods were never shipped to D&S. The absence of such allegations renders significant the absence in the second amended complaint of any motive by Schwartz for participating in the alleged enterprise (for example, no kickbacks from Saul's profits are alleged). The most that can be inferred against Schwartz from the factual allegations is that Schwartz was negligent in the conduct of A.P. Walter. This inference arises solely from the allegation in ¶6(D) that the removal of merchandise for purposes of executing the scheme was carried out in a way contrary to A.P. Walter's customary practice of having a common carrier remove merchandise to be shipped. The court is unwilling to infer more than negligence from this allegation, especially as it is coupled with the lack of other allegations tending to show at least culpable recklessness and the absence of any motive of Schwartz to participate in the scheme. The allegations that Schwartz knew of the removal of merchandise and mailed the statements and invoices do not show specific intent and are consistent with Schwartz having been himself defrauded by Saul and those to whom the parts were eventually sold. Schwartz's

position as president or "owner" of A.P. Walter does not alone permit him to be held personally liable for the wrongdoing of A.P. Walter's officers and agents. The allegations do not show that Schwartz participated in any of the predicate acts upon which Count I's RICO claim is based. Schwartz is dismissed as a defendant to Count I.

A.P. Walter is also dismissed as a defendant to Count I. While the second amended complaint contains several allegations of A.P. Walter's knowledge of the fraudulent mailings and of the failure to ship the invoiced goods to D&S, no factual allegations exist in Count I to impute such knowledge to the corporation. As discussed above, knowledge and participation in the mail fraud scheme has not been alleged against A.P. Walter's chief and, according to D&S, only officer. Saul is the only other agent of D&S from which such participation by A.P. Walter can be inferred. The second amended complaint alleges that Saul carried out the major elements of the scheme. Saul removed the merchandise (¶6(A), (C), (D)) and sold it to third parties (¶¶6(E), 7). The assistance of the other defendants in carrying out this scheme is consistent with the corporation's normal conduct of its business. If Saul's position at A.P. Walter were not such as would allow imputation of his acts and intentions to the corporation, the allegations at this point contain no basis for concluding that A.P. Walter was a participant in the scheme. Indeed, as now drafted, the second amended complaint is consistent with a view that A.P. Walter was the victim of a scheme by Saul.

D&S does not allege or argue that Saul's position at D&S was any but that of a lower level employee. Nothing in the complaint persuades the court that more than that should be inferred. Hence, like the court in *Parnes v. Heinold Commodities, Inc.*, 548 F.Supp. 20, 24 (N.D. Ill. 1982), the court will not, without more, accept allegations of Saul's wrongdoing as sufficient to allege wrongdoing by A.P. Walter. A.P. Walter is dismissed as a defendant to Count I.

Saul remains a defendant to Count I. The court must therefore determine whether Count I properly alleges the existence of a RICO "enterprise." The second amended complaint, as explained in D&S's Response, alleges that the RICO enterprise is the union of Saul, Schwartz, A.P. Walter, and third parties, including Ronald Duntz, David Much, and Just Parts, Inc., to whom Saul sold the removed merchandise. This represents a change from the preceding complaints in which it appeared that the enterprise was alleged to have been A.P. Walter. The court had previously held that A.P. Walter could not be both enterprise and defendant. As a result, A.P. Walter was dismissed as a defendant to the RICO claims. *D&S Parts, Inc. v. Schwartz, et al.*, No. 82 C 5279, slip op. at 4 (N.D. Ill. Oct. 13, 1983). Apparently attempting to allege an enterprise in the conduct of which A.P. Walter could also be a defendant, D&S now alleges an enterprise comprising an association in fact of the above-described persons and entities. The enterprise is not a legal entity, and appears bound solely by the racketeering activities alleged in the second amended complaint.

In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court held that a wholly criminal enterprise may be an enterprise as that word is defined in the RICO statute. In rejecting an argument that a wholly criminal enterprise would be the equivalent of the "pattern of racketeering activity," rendering superfluous the enterprise requirement, the Court explained:

> In order to secure a conviction under RICO, the government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. [Citation omitted.] The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function

> as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Id. at 583. Defendants interpret *Turkette* as holding that when the alleged enterprise consists solely of the commission of the acts of racketeering, a RICO enterprise is not stated. This has been the interpretation of the enterprise requirement by the Eighth Circuit. *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Lemm*, 680 F.2d 1193, 1201 (8th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 739 (1983).[1]

The language in *Turkette*, however, contemplates situations in which the evidence showing the enterprise and the pattern of racketeering would "coalesce." The enterprise's associates need only be for the "common purpose of engaging in a course of conduct," performed as an ongoing organization with members functioning as a "continuing unit." When these requirements are met, even

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[1] In *Anderson*, the Court explained that the RICO enterprise must have some "ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.' " 626 F.2d at 1372. It recognized at that point that the Seventh, among other circuits, did not recognize this theory of the enterprise. *Id.* The court has been unable to find any Seventh Circuit cases citing *Anderson*, *Lemm*, and their progeny for the proposition that the enterprise must have a goal separate from the intent to conduct racketeering activities.

though the course of conduct consists solely of racketeering, a RICO enterprise may be stated. However, a group that simply performs two or more stray acts of racketeering, without an intent to act as a continuing organization, would not fall within the scope of RICO.

This was the Seventh Circuit's interpretation of the enterprise in a pre-*Turkette* case. In *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980), the defendants had committed three robberies. Their criminal indictment under RICO described the enterprise as "a group of individuals associated in fact to plan and commit robberies, to carry away stolen goods and all proceeds derived therefrom . . . ." *Id.* at 302. The indictment further charged that the defendants conducted and participated "in the conduct of such enterprise's affairs through a pattern of racketeering activity, to wit, the commission of robberies [in the three cities where the three robberies occurred]." *Id.* In *Aleman*, the Seventh Circuit held that wholly illegal organizations may be RICO enterprises. The Court then explained:

> In [United States v. Elliot, 571 F.2d 880, 898 (5th Cir.), cert. denied, 439 U.S. 953 (1978)], the court analogized the illegal enterprise there under consideration to a large business conglomerate with a chairman of the board overseeing the operations of separate corporative departments. Perhaps such an impressive organization was the ambition of the defendants in the present case. At the time it was closed down, however, at least so far as the evidence reveals, it could only be regarded as a small business. Aleman was the proprietor. The business office was the Survivor's Club [where the defendants planned the robberies]. Their investment in equipment was negligible as the cars they used were stolen. The payroll was limited.

Id. at 305. Post-*Turkette* cases also have found RICO enterprises in organizations which are bound together only through racketeering activities. In *Bunker Ramo Corp.*

v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983), a scheme to defraud was perpetrated similar to that alleged here. There, plaintiffs Bunker Ramo alleged that one of its employees (Cywan), an Illinois corporation (United Business Forms), and that corporation's president (Reif), engaged in a scheme to defraud Bunker Ramo through Cywan's acceptance on behalf of Bunker Ramo of inflated invoices from United Business Forms. There, the enterprise was the combination of United Business Forms, Reif and Cywan. In *Bunker Ramo*, the Court examined the enterprise with a view to determining whether the enterprise, apart from its racketeering activities, must affect interstate commerce. The court held that the nexus with interstate commerce is established even if only the racketeering activities affect such commerce. *Id.* at 1289. While it was not presented with the question, the Court did not mention that the type of enterprise alleged, bound together only by the acts of racketeering, was improper under RICO. *See also United States v. Elliott*, 571 F.2d 880, 897-898 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Phillips*, 64 F.2d 664 F.2d 971, 1012-1014 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2965, 103 S.Ct. 208 (1982).

From this description, it is clear that no proper enterprise is alleged in Count I. Under *Turkette*, A.P. Walter, Schwartz, Saul, Duntz, Much, Just Parts, Inc., and other third parties must have been associated in fact "for a common purpose of engaging in a course of conduct," in an organization evidencing an intent to function as a continuing unit. The court has already found, however, that the allegations are insufficient to establish that A.P. Walter and Schwartz were engaged in the scheme to defraud. The allegations similarly fail to indicate that Schwartz and A.P. Walter associated with the other persons constituting the enterprise for the common purpose of engaging in a course of conduct. The court cannot conceive of a course of conduct common to all of the persons and entities in the alleged enterprise except for the scheme to defraud, in which the allegations do not show participation by Schwartz

and A.P. Walter. Hence, the enterprise alleged is not a proper RICO enterprise.

The only other enterprise the court can find is the association in fact of Saul with Much, Duntz, Just Parts, Inc., and the other third parties. The court finds that this association does allege a RICO enterprise. The activities of the enterprise involve the disposition of the merchandise reflected on the false billings to D&S. Those acts occurred over close to five years and involved merchandise reflected on over three hundred mailings. The allegations would allow D&S to show that the association of the persons was organized as a continuing unit, with different functions ascribed to each participant (Saul selling and the others purchasing the stolen goods). This is so whether or not all of the participants were engaged in the actual mail fraud or knew that the goods were stolen, since they all were engaging in the disposition of the goods.

The court also finds that plaintiff has sufficiently alleged an injury under RICO. Defendants contend that §1964 requires an injury distinct from any injury resulting from the predicate acts of racketeering. This court now holds that:

> where the plaintiff has suffered injury from the conduct of the enterprise through a pattern of racketeering activity, a RICO claim is stated even though the injury is also a direct result of the predicate offenses.

States Security Insurance Co. v. Mercantile Bond Agency, Inc., No. 83 C 285, Order (N.D. Ill. Sept. 2, 1983); *accord Swanson v. Wabash, Inc.*, 577 F.Supp. 1308 (N.D. Ill. 1983) (Aspen, J.); *Addis v. Moser*, 83 C 6118, Order (N.D. Ill. Feb. 15, 1984) (Marshall, J.).

Schwartz and A.P. Walter are dismissed as defendants to Count I. Saul remains in Count I as a person conducting and participating in the conduct of the affairs of the enterprise consisting of himself and the parties to whom he sold the removed merchandise.

Count II

In Count II, D&S repeats all of its previously made allegations and adds facts relevant to the time period between March 2, 1982 and August 1982. According to D&S, Schwartz was present when on March 2, Saul confessed to removing the merchandise from A.P. Walter and billing it to D&S. However, after that confession, A.P. Walter allegedly continued to mail statements to D&S for merchandise neither shipped to nor received by D&S. More than one such false statement was mailed to D&S, with "actual knowledge" by A.P. Walter and Schwartz that they were false and fraudulent. (Second Amended Complaint ¶5.) Motive for this behavior is found in D&S's sixth allegation that Saul returned the merchandise he had removed to A.P. Walter, that A.P. Walter sold or held for sale that merchandise, and that A.P. Walter billed D&S for this very merchandise that was not delivered to D&S or indeed that was sold to others. These new allegations in Count II do state claims of specific intent to defraud against Schwartz and A.P. Walter.

The next question is whether Count II states RICO claims against the defendants. Count II alleges violations of §1961(a), (b), and (c). In general, these provisions require, respectively, investment; maintenance or acquisition of an interest; and participation in the affairs of the RICO enterprise through a pattern of racketeering activity. D&S must first allege the existence of such a RICO enterprise.

D&S simply repeats its enterprise allegations from Count I, that is, that Schwartz, A.P. Walter, Saul, Duntz, Much, and Just Parts, Inc., were associated in fact to carry out the racketeering activities and the sale of merchandise billed to D&S to enterprise members. The court has already found that the allegations of Count I do not establish that Schwartz and A.P. Walter associated with the other members "for the common purpose of engaging in a course of conduct," nor that they functioned as a "continuing unit" with the others. Such association in fact

must also be shown here for the conduct occurring after March 2, 1982.[2] The allegations in this count do show that Schwartz and A.P. Walter were associated in fact to deceive D&S through false mailings. However, participation by Saul, Duntz, Much, and Just Parts, Inc. is not clearly alleged to have continued at this stage. The allegations seem to indicate that the opposite would be the case and that this scheme was halted by state criminal proceedings and Saul's confession. (See Second Amended Complaint Exhibit A; cf. Count II ¶6.) Hence, according to the complaint's unclear allegations, the only participants in the RICO enterprise in Count II are A.P. Walter and Schwartz, that is, the corporation and its president. Hence, the court interprets the allegations as claiming that the enterprise was simply A.P. Walter. A.P. Walter is therefore dismissed as a defendant, as the court has already held in this case that the enterprise may not be the defendant. Since D&S allegedly paid false invoices through August 1982, he has alleged an injury in his property from the scheme of Count II. The court infers that some of D&S's losses stemmed from payment of the false invoices issued from March through August 1982. Hence, RICO injuries have been stated and the motion to dismiss is denied.

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[2] D&S claims in the second count's ¶10 that the conduct of Schwartz and A.P. Walter after March 3, 1982 "ratified" the past activities of Saul and those to whom he sold the merchandise. No written or spoken actual ratification of agent Saul's acts is alleged, so D&S must claim that the principal's conduct after March 3 constituted such ratification. The court is not persuaded that the facts as alleged support this legal conclusion, for the character of Schwartz's and A.P. Walter's activities after Saul's confession differed from that of Saul's activities before the confession, namely, the post-confession scheme was directed to obtaining double billings for A.P. Walter's merchandise. The Count II enterprise is not merely a continuation of pre-confession activities by Saul and those to whom he sold the removed merchandise. Hence, Count II is limited to events occurring on or after March 2, 1982.

Conclusion

A.P. Walter and Schwartz are dismissed as defendants to Count I. A.P. Walter is dismissed as a defendant to Count II. The motion to dismiss is denied in all other respects.

It is so ordered.

/s/ SUSAN GETZENDANNER
Susan Getzendanner
United States District Judge

July 6, 1984

[Dated September 10, 1984]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 5279

D & S AUTO PARTS, INC.,

Plaintiff,

v.

SCHWARTZ, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This action is before the court on the motions to dismiss of A.P. Walter & Company Inc. ("A.P. Walter"). The motions address the sufficiency of the second and third amended complaints to state a claim against A.P. Walter. The motion with respect to the second amended complaint has been fully briefed by the parties. The court finds briefs unnecessary to a disposition of the motion regarding the third amended complaint. For the reasons stated below, the motions are granted, and A.P. Walter is dismissed as a defendant to this action.

Second Amended Complaint

The motion regarding the second amended complaint concerns only the sufficiency of the allegations in Count III to state a claim against A.P. Walter. The court had previously dismissed A.P. Walter as a defendant to Counts I and II of the three-count second amended complaint.

The court did not address the sufficiency of the pendent state claim in Count III, as the parties' memoranda failed to address this issue. A.P. Walter now moves to dismiss it from Count III and from the entire action.

A.P. Walter is a defendant only to the pendent state claim in this complaint, although federal claims remain against co-defendants. The court's jurisdiction over A.P. Walter, therefore, depends on the assertion of pendent party jurisdiction, since there are no pendent federal claims against this defendant to justify pendent claim jurisdiction. It is likely that the court does have such jurisdiction in this case. *See Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 187-88 (7th Cir. 1984). Assuming the court may exercise jurisdiction and chooses to do so in this case, A.P. Walter must still be dismissed from this action, as Count III fails to state a claim against it upon which relief may be granted.

Count III realleges the allegations of Count I. Plaintiff then claims that it made payments to A.P. Walter based on the misrepresentations contained in the monthly statements. (Second Amended Complaint, Count III, ¶¶2-4.) The court has already found, however, that knowledge of the misrepresentations cannot be imputed to A.P. Walter on these allegations until at least March 2, 1982. *D & S Auto Parts, Inc. v. Schwartz, et al.*, No. 92 C 5279, slip op. at 3-6, 12 (July 6, 1984 N.D. Ill.). By plaintiff's own allegations, it ceased paying the monthly statements in January 1982. (Second Amended Complaint, Count I, ¶10.)

In Illinois, an action for fraudulent misrepresentation, clearly the claim asserted in this count, requires a misrepresentation of a material fact made to induce reliance thereon. Furthermore, the party intended to rely on the statement must in fact so rely to its detriment. *Brayton Chemicals, Inc. v. First Farmers State Bank of Minier*, 671 F.2d 1047 (7th Cir. 1982). Here, plaintiff's own allegations demonstrate that at the time A.P. Walter knowingly misrepresented items on the monthly statements, plaintiff had ceased to rely on and pay those statements. A crucual element of fraud is therefore missing from the al-

legations. A.P. Walter must be dismissed from Count III of the Second Amended Complaint. The second amended complaint therefore fails to state a claim against A.P. Walter and it is dismissed from this action.

Third Amended Complaint

While the parties briefed the motion to dismiss Count III, plaintiff filed a third amended complaint. Counts I, II, and IV fail to add allegations sufficient to state a claim against A.P. Walter. Count III is a new claim for conversion. The allegations on the third amendment continue to be unclear, but it appears that the conversion claim is based on plaintiff's right to immediate possession of the auto parts for which it paid that defendant Saul removed and sold to other defendants. Apart from the fact that demand and refusal are not alleged (nor alleged to have been futile), it seems inescapable from the allegations that A.P. Walter did not have possession or ownership of the auto parts at the time D & S had the right to their immediate possession. Rather, Saul removed the parts and D & S was later billed and paid for them. The allegations also indicate that Saul removed the parts that are the subject of the conversion at the time that his actions could not be imputed to A.P. Walter. (Again, A.P. Walter did not gain knowledge of Saul's acts until after plaintiff ceased to pay for, and thus have the right to possess, the auto parts.) Thus, at the time D & S had the right to immediate possession of the parts, A.P. Walter was not exerting possession or ownership of them. The third amended complaint therefore fails to state a claim against A.P. Walter.

A.P. Walter is dismissed as a defendant to the second and third amended complaints. It is so ordered.

/s/ SUSAN GETZENDANNER
Susan Getzendanner
United States District Judge

September 10, 1984

[Dated December 16, 1986]

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

D & S AUTO PARTS, INC., an Illinois Corporation,

Plaintiff,

v.

BERNARD SAUL,

Defendant.

No. 82 C 5279—Judge Getzendanner

JUDGMENT ORDER

This matter coming on for trial on November 8, 1986, before the court without a jury, the Honorable Susan Getzendanner, District Judge presiding. Mason D. Sullivan, appeared as attorney for the plaintiff and Bernard Saul having been served with summons and having appeared and having been advised of the trial date, was neither present nor represented by counsel during the trial of this case. Having heard the testimony, examined the other evidence produced by the plaintiff and having heard the arguments of counsel for plaintiff, and this cause having been submitted for decision, and the Court being fully advised herein, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Commencing on or about October 6, 1977 and continuing to January 22, 1982, Bernard Saul was an employee and salesman for A.P. Walter Company.

2. A.P. Walter Company is a wholesaler or distributor of new and rebuilt auto parts.

3. Commencing on or about October 6, 1977 and continuing to January 22, 1982 the defendant Bernard Saul initiated a practice of writing up an order to A.P. Walter Company for new and rebuilt auto parts which order reflected that the merchandise was to be delivered to the plaintiff corporation by Bernard Saul.

4. During the period of time in question Bernard Saul wrote 250 separate orders to A.P. Walter Company for new and rebuilt auto parts for which the plaintiff was charged. The new and rebuilt auto parts as reflected on the 250 orders were not ordered by the plaintiff and were not delivered to the plaintiff by Bernard Saul or any other person or corporation. The total cost of the merchandise reflected on the 250 orders was $155,445.20.

5. After each order was prepared by Bernard Saul, a copy of the order i.e. invoice would be posted by A.P. Walter Company in the U.S. Mail and delivered to the plaintiff corporation. There were in excess of 150 mailing of orders i.e. invoices.

6. At the end of each month during the period in question A.P. Walter Company would post in the U.S. Mails a monthly statement to the plaintiff corporation which statement would include the invoices for merchandise for which the plaintiff was billed and neither ordered nor received the goods. There were 49 separate mailing of monthly statements to the plaintiff corporation by A.P. Walter Company.

7. The plaintiff corporation during the period from October 6, 1977 to January 22, 1982, was unaware that it had not received the new and rebuilt auto parts for which it had been billed by A.P. Walter Company on the 250 invoices and as reflected on the 49 monthly statements.

8. The plaintiff though unaware that it had not ordered or received the merchandise reflected on the invoices, and monthly statements thereafter paid A.P. Walter Company the sum of $155,445.20.

9. Bernard Saul on February 16, 1985 entered a stipulation to the facts as set forth above in response to indictment number 82 C 10237 returned in Cook County, Illinois and Bernard Saul was thereafter found guilty by the Circuit Court of Cook County, Illinois Criminal Division of two counts of theft.

CONCLUSIONS OF LAW

The law is with the plaintiff and against the defendant Bernard Saul as to all counts of the third amended complaint.

The defendant Bernard Saul was part of an enterprise which was engaged in a pattern of racketeering activity as defined in 18 U.S.C. Sec. 1961(1) to wit mail fraud (18 U.S.C. Section 1341) and thereby violated 18 U.S.C. Section 1962(a) and (c) in that Bernard Saul received income directly from a pattern of racketeering activity and participated directly in the conduct of an enterprises affairs through a pattern of racketeering activity.

Plaintiff has been damaged by the conduct of the defendant Bernard Saul in the amount of $155,445.20 and that pursuant to 18 U.S.C. Section 1964(c) the damages are hereby trebled and judgement is entered against Bernard Saul in the amount of $466,335.60.

It is hereby ordered adjudged and decreed that a judgement in the amount of $446,335.60 is entered against Bernard Saul and in favor of the plaintiff D & S Auto Parts, Inc.

Dated this 16th day of December, 1986.

Enter:

/s/ SUSAN GETZENDANNER
Judge Susan Getzendanner